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IN THE IOWA DISTRICT COURT FOR OSCEOLA COUNTY

[redacted], by and through his mother, [redacted] and [redacted], individually, **Plaintiffs,** **vs.** **SIBLEY-OCHEYEDAN COMMUNITY SCHOOL DISTRICT; MEDIAPOLIS COMMUNITY SCHOOL DISTRICT; and SIOUX CITY COMMUNITY SCHOOL DISTRICT,** **Defendants.**	**CASE NO. LACV020030** **PLAINTIFF'S SUPPLEMENTAL BRIEF IN RESISTANCE TO SIOUX CITY COMMUNITY SCHOOL DISTRICT'S AND MEDIAPOLIS COMMUNITY SCHOOL DISTRICT'S MOITION FOR SUMMARY JUDGMENT**

COME NOW, Plaintiffs, [redacted]. and [redacted]., by and through the undersigned counsel, and hereby state the following in support of their resistance to Sioux City Community School District's ("SCCSD") and Mediapolis Community School District's ("MCSD") Motions for Summary Judgment:

FACTS

Plaintiff hereby incorporates the Statement of Material Facts filed contemporaneous to this resistance to SCCSD's and MCSD's motions for summary judgment. Other relevant facts may be discussed throughout the argument section *infra*.

Additionally, it is important to recognize that the Plaintiff in this case believes that SCCSD and MCSD are interpreting this Court's prior motion to dismiss entirely too narrow. Through the pending motions to dismiss and now motions objecting to SOCSD's motion to file a cross-petition, it is apparent that SCCSD and MCSD assert an extremely limited cause of action remains in this matter. If this is true, it runs afoul to many of the obligations and duties that are established by expert testimony and, in some instances, the testimony of SCCSD's own supervisors. As an example, as support for denying MCSD's motion for summary judgment, Plaintiff has provided

an affidavit of his expert witness establishing the duty of educators regarding reporting and causation. Further, both Doug Robbins and Rita Vannatta recognized that SCCSD's policy required any information to be reported to Human Resources. (CA APP 34, Robbins Deposition at 43-45; CA APP 60-61, Vannatta Deposition at 27-29). Further, Ms. Vannatta, the current Human Resources representative recognized that this type of information must be reported to the Iowa Board of Educational Examiners and that would result in the teacher being "probably out of public education." (CA APP 60, Vannatta Deposition at 27-28). Finally, the duty of schools in cases similar to the one pursued in this case has been discussed approvingly within the context of the Restatement (Third) of Torts Phys. & Emot. Harm § 46 (2012), comment *i.* ("…if a school recklessly ignores a pattern of child abuse by an employee, thereby posing a risk that some yet-unidentified children will suffer similar harm in the future, the 'directed at' limitation does not shield the school from liability to those who are later abused by the offending employee."). These recognized and essentially uncontroverted duty requirements are clearly within the causes of action pled by the Plaintiff and remain in this case but are not addressed by SCCSD's and MCSD's motions for summary judgment.[1] However, as recognized by SOCSD's motion for cross-petition, it is clear that SOCSD reads the Court's ruling on the motions to dismiss in the proper manner. This information and these positions will be discussed in further detail below.

ARGUMENT

I. Summary Judgment Standards

"Summary judgment is proper when the summary judgment record reveals no genuine issue of material fact and the moving party is therefore entitled to judgment as a matter of law."

[1] To the extent the SCCSD and MCSD's interpretation may be correct, Plaintiff respectfully requests that this Court revisit its prior ruling on the motions to dismiss in light of this undisputed evidence and authority.

Garvis v. Scholten, 492 N.W.2d 402, 403 (Iowa 1992). Iowa R. Civ. P. 1.981(3) states that judgment is proper:

> if the pleadings, depositions, answers to interrogatories and admissions on file, together with the affidavits, if any, show that there is no genuine issue as to any material fact and that the moving party is entitled to a judgment as a matter of law.

"Summary judgment is appropriate only when the entire record before the court shows that there are no genuine issues of material fact…" *Carr v. Bankers Trust Co.*, 546 N.W.2d 901, 903 (Iowa 1996). "An issue of fact is 'material' only when the dispute is over facts that might affect the outcome of the litigation, given the applicable governing law." *Dickerson v. Mertz*, 547 N.W.2d 208, 212 (Iowa 1996). "[T]he moving party is required to show that no genuine issue of material fact exists and that he or she is entitled judgment as a matter of law. In determining whether the movant has met this burden, we review the record in a light most favorable to the party opposing summary judgment…the nonmoving party [is] entitled to every legitimate inference that reasonably can be deduced from the evidence and summary judgment is inappropriate if reasonable minds can differ on how the issue should be resolved." *Id.*

II. Genuine Issues of Material Fact Exist to Deny SCCSD's Motion for Summary Judgment

In this Court's ruling regarding SCCSD's motion to dismiss, it recognized that a cause of action against SCCSD may exist if the facts establish that SCCSD failed to notify any of Kyle Ewinger's future employers of an incident in which Kyle Ewinger is alleged to have given a pill to a student and was investigated by Iowa DHS and the Sioux City Police Department. Based upon this Court's language, SCCSD has filed the currently pending motion for summary judgment. SCCSD relies on two arguments (citing no authority) to support its motion for summary judgment: (1) the individuals who sent letters of recommendation did not have the authority to send the letters

and (2) the individuals at SCCSD contacted by SOCSD, did not have knowledge of the incident and therefore there was no breach of duty. However, SCCSD has not given this Court a full picture of the underlying facts and, when the record is viewed in the light most favorable to Plaintiff with all reasonable inferences drawn in Plaintiff's favor, it becomes readily apparent that SCCSD's motion for summary judgment should be denied.

Based upon the record currently available to the Plaintiff, it is known that on or about February 18, 2013, Ewinger submitted an application to SOCSD seeking employment as a Head Football Coach, Elementary Teacher and/or a Middle School Social Studies Teacher. (CA APP 10). On this application, Ewinger listed his previous employers, which included four (4) different SCCSD contacts. (CA APP 11-12). It is also known that SOCSD's superintendent was Tom Becker at the time of Ewinger's hiring and that Michael Morran and Steve Bruder from SOCSD's were involved with Ewinger's hiring. (CA APP 24-25). It is also known that on SOCSD's employment file regarding Ewinger, a handwritten telephone number is placed next to one of SCCSD's, which coincides with a phone number associated with SCCSD. (CA APP 11) Additionally, Mr. Morran specifically testified that he contacted several individuals from SCCSD, including Amy Gilbert (a principle at SCCSD), Dale Veatch (an athletic director at SCCSD) and the director of Human Resources at SCCSD. (CA APP 25-28). None of these individuals reported the incident to Morran when he was calling for references. (CA APP 25-28). Morran testified that this information would have been important for him in the hiring process and he specifically testified that if he "knew those allegations, he wouldn't have gotten the job [at SOCSD]". (CA APP 28). Similarly, the superintendent ultimately responsible for recommending Ewinger being hired by SOCSD testified that he had no knowledge of any incidents at any other schools. He also

testified that had he had that information he never would have recommend Ewinger be hired at SOCSD. (CA APP 22).

SCCSD's first basis for summary judgment is that there is no evidence anyone from SCCSD communicated with SOCSD regarding Ewinger. Based upon the testimony of Mr. Morran, this is simply not the case. The undisputed evidence in this case is that SCCSD did communicate with SOCSD, SCCSD never reported any inappropriate behavior to SOCSD and, had that information been provided to SOCSD, SOCSD would have never hired Ewinger. Based upon these undisputed facts and this Court's prior ruling, this Court must deny SCCSD's motion for summary judgment.

In any event, even if one were to ignore the foregoing facts, the sole basis for SCCSD's summary judgment motion—namely, that SCCSD is not responsible for statements in letters of recommendation by SCCSD's teachers—is fundamentally flawed under basic agency principles.[2] Both Uhl and Mortan expressly addressed these letters as employees of SCCSD, including identifying their employer beneath their name and providing their return address of their employer:

Megan Morton
Crescent Park Elementary School
1114 West 27th Street
Sioux City, IA 51103

Mrs. Barbara M. Uhl
Crescent Park Elementary School
1114 W. 27th St.
Sioux City, IA 51103
(712) 279-6825

[2] As the Court previously held in denying SCCSD's Motion to Dismiss, SCCSD had a duty to take reasonable care "when providing notice of a teacher's behavior and character to a teacher's prospective school district employer(s)." (MTD Ruling at 2). Two SCCSD employees—Megan Morton and Barbara Uhl—sent letters of recommendation to SOCSD. Uhl stated, *inter alia*, that "Kyle would be an ***excellent asset*** to any elementary school position." (Ex. B, Uhl Letter of Recommendation (emphasis added)). Mortan went further, stating "Kyle Ewinger is ***and will continue to be*** devoted to becoming the best kind of educator. . . . Thus, ***I recommend him highly***." (Morton Letter of Recommendation (emphasis added)). There is no mention whatsoever in either letter of recommendation notifying SOCSD of the prior allegations of misconduct. All of this is undisputed.

(*See* Morton Letter of Recommendation; Uhl Letter of Recommendation). In fact, Morton also *signed* the letter in her capacity as a "Level II special education teacher." Neither Morton nor Uhl acted outside the scope of their authority as employees of SCCSD by writing the letters of recommendation. *See Hendricks v. Great Plains Supply Co.*, 609 N.W.2d 486, 493 (Iowa 2000) ("Actual authority to act is created when a principal intentionally confers authority on the agent . . . through . . . conduct which, reasonably interpreted, *allows the agent to believe that he has the power to* act. Actual authority includes both express *and implied* authority. . . . [I]mplied authority is *actual authority circumstantially proved.*" (emphasis added)); *Waukon Auto Supply v. Farmers & Merchs. Sav. Bank*, 440 N.W.2d 844, 847 (Iowa 1989) (apparent authority exists where principal led other party to believe agent had authority to act). Indeed, both Morton and Uhl agree that they did not need permission from SCCSD to send the letters of recommendation. Uhl Affidavit at ¶ 5 ("I did not seek the permission of anyone in the school administration to write this letter, ***nor do I believe permission was required.***" (emphasis added)); Garbe Affidavit at ¶ 9 (same). Further, SCCSD's current Human Resources director stated that it is within a teacher's "professional responsibilities to share if they have a colleague that's spouse is moving to be able to tell another district how well they worked with others in the building." CA APP 59-60, Vannatta Deposition at 21-22. Thus, it is undisputed that under the umbrella of SCCSD, it is ***expected*** that teachers, in their capacity as an employee of the district to, submit these types of letters of recommendation. Because Morton and Uhl had authority to send letters of recommendation—and held themselves out as employees of Defendant SCCSD in the letters—SCCSD is liable for the conduct of Morton and Uhl. *See Gabelmann v. NFO, Inc.*, 571 N.W.2d 476, 481 (Iowa 1997) ("A basic element of agency law is that whatever an agent does, within the scope of the agent's actual authority, binds the agent's principal."); Restatement (Third) of Agency § 7.08 (principal liable when agent with

apparent authority "when actions taken by the agent with apparent authority constitute the tort"); *see also Van Fossen v. MidAmerican Energy Co.*, 777 N.W.2d 689, 697 (Iowa 2009) (citing with approval Restatement (Third) of Agency § 7.08).

The second apparent basis for SCCSD's motion for summary judgment is that even if a supervisor at SCCSD knew of the allegations, because SOCSD did not talk to that specific supervisor there can be no risk of harm. This argument, which is not supported by a ***single*** authority, is preposterous and flies in the face of the long-established agency principle of imputed knowledge. "Under the doctrine of imputed knowledge, a corporation is presumed to have any knowledge acquired by a corporate officer, employee, or other agency while acting in furtherance of the business of the corporation or in the course of his [or her] employment." § 29.15 Imputed knowledge and notice, 6 IA Prac., Business Organizations § 29.15; *see also* Restatement (Second) of Agency § 272 (1958) (In accordance with and subject to the rules stated in this Topic, the liability of a principal is affected by the knowledge of an agent concerning a matter as to which he acts within his power to bind the principal or upon which it is his duty to give the principal information."). Imputed knowledge has also been explicitly recognized by the Iowa Supreme Court in *Kemin Industries, Inc. v. KPMG Peat Marwick LLP*, 578 N.W.2d 212, 216 (Iowa 1998) where the Court stated: "We have concluded in several cases that the knowledge of an officer or employee of the corporation is imputed to that corporation when the information is pertinent to the duties of the officer or employee receiving it." Imputed knowledge is so well established that it has lead one Iowa legal scholar to opine the following: "Whatever the rationale, the imputed knowledge doctrine is a settled rule both in agency law and in its application in the corporate law context." § 29.15 Imputed knowledge and notice, 6 IA Prac., Business Organizations § 29.15. In

this case, there is ample evidence, in the light most favorable to the Plaintiff, to establish that SCCSD had knowledge of Ewinger's deplorable acts.

Former Iowa Department of Human Services employee Robert Ameen (hereinafter "Ameen") provided the initial investigation of Ewinger's actions while Ewinger was employed by SCCSD in 2010. (CA APP 37-38, Ameen Deposition at 3-4). As part of that investigation, Ameen eventually interviewed Ewinger at the SCCSD. In fact, Ameen believes the interview likely occurred in principal Doug Robbins' (hereinafter "Robbins") office at SCCSD's Riverside Elementary. (CA APP 40, Ameen Deposition at 16). According to Ameen, present for at least part of the interview were Ameen, Ewinger, Sioux City Detective Kelcey Stubbe. (CA APP 40-41 Ameen Deposition at 16-17). Ameen specifically recalled informing Robbins of the allegation and testified as follows:

> Q. Let me ask you this: At any point in time did you ever have communication with Mr. Robins [sic] about why you were there and what you were doing?
> A. After the interview with Mr. Ewinger, he left and I said the same thing to Mr. Robins [sic] that I said to Mr. Ewinger, "Are you crazy? Are you nuts? In today's environment hanging out with a little kid at school? Don't do that. Don't do that."
> Now I've done this long enough that I know there are some people that are just nice people. But there was something very unusual about Mr. Ewinger and he – you know, later on when I reflected back, I think we're going to hear form him again.
> Q. And you specifically told Mr. Robins [sic], the principal, about your reservations with Mr. Ewinger?
> A. Yeah, I – in fact, I remember saying, "You got to keep an eye on this guy. Don't let him take kids home or make friends with them, you know." I said, "We just – this is odd behavior. This is very odd behavior."

(CA APP 41-42, Ameen Deposition at 17-18).

> Q. What was Mr. Robins's [sic] reaction, if you recall, when you told him that there was, you know, a bad situation, he needs to watch Mr. Ewinger, that type of thing?

> A. He wasn't saying anything. He had a very concerned look on his face. That I – you know, he was – I could tell his wheels were going and he had a concerned look on his face. But I – I – you know, he wasn't really able to do much more than that. And I – and I think that's just part of school administration stuff. You're not going to have a conversation about concerns with an employee or fellow teacher.

(CA APP 44-45, Ameen Deposition at 20 – 21).

In addition to Ameen, the mother of the boy who was at the center of the investigation in 2010, also had communication with Robbins. Specifically, she testified:

> Q. At any point in time, did you have any communication with school administrators at Sioux City Community School District or Riverside Elementary specifically about your concerns, anger, or frustration with the relationship that Kyle Ewinger had with your son?
> A. Definitely. Yes.
> Q. And do you recall who that would have been with?
> A. The principal at the time.
> Q. And do you remember who that was?
> A. I think it was Mr. Robins [sic].
> Q. And what do you recall about the communication that you had with Mr. Robins [sic]?
> A. Just being in the office and talking about him being moved and what was going to happen, you know.

(CA APP 53, Ogle Deposition at 11).

The testimony of Ameen and the mother of the boy involved in the investigation, create a fact question as to what Robbins knew. Importantly, this knowledge obtained by Robbins was imputed upon SCCSD as a whole and therefore SCCSD had knowledge of the investigation and as recognized by this Court, if SCCSD had knowledge regarding the investigation and failed to report this information to SOCSD, it creates a risk of harm to students at SOCSD and [redacted] Based upon these facts and all evidence viewed in the light most favorable to the Plaintiff, this Court should deny SCCSD's motion for summary judgment.

Finally, it is important to note the absurdity of SCCSD's position. In ignoring well established agency principles, SCCSD is arguing that because SOCSD did not call a specific

individual who had knowledge regarding Ewinger's obscene behavior they should avoid all liability. Despite having to overturn decades years of precedent, the practical implications to this position are significant. This case shows the exact problem. SCCSD has 2,000 employees. (CA APP 55, Vannatta Deposition at 7). According to SCCSD's motion for summary judgment, SOCSD would have to know which one of the 2,000 employees to contact in order to get all of the information against Ewinger. This truly an impossible task and above and beyond the requirements necessary for any individual or corporation. This is one of the significant reasons the doctrine of imputed knowledge is in existence and it should not be disregarded by this Court. Accordingly, this Court should deny SCCSD's motion for summary judgment.

III. Genuine Issues of Material Fact Exist to Deny MCSD's Motion for Summary Judgment

In 2004 MCSD learned that one of its teachers, Kyle Ewinger, reportedly humped a MCSD student while lying with him in a sleeping bag. At that time, the school also knew that Ewinger had reportedly sucked on MCSD students' toes at the public swimming pool, allowed MCSD students to sit on his lap during school, had MCSD students give neck and shoulder rubs, had MCSD students stay overnight at his house, and got into MCSD students' private areas. All of these children were elementary school boys. The humping incident was the last straw and, desperate to rid itself of Ewinger, MCSD entered into a Faustian pact: In exchange for Ewinger's irrevocable resignation and ineligibility for future employment with MCSD, MCSD agreed to conceal from prospective employers Ewinger's conduct, not to report Ewinger's conduct to the Iowa Board of Educational Examiners as required by law, and prepare a neutral letter of recommendation that would make it more likely that Ewinger would remain a teacher and get hired elsewhere. In doing so, MCSD created a risk of physical harm to Ewinger's future students, including C.A., by making it more likely that they would be exposed to a teacher with pedophilic

proclivities. But for MCSD's agreement of concealment, Ewinger would not have been employed as an elementary school teacher thereafter and, thus would not have been hired at Sibley-Ocheyedan Community School District ("SOCSD"). Instead, tragically—but predictably—MCSD's concealment paved the way for Ewinger to obtain future employment as an elementary school teacher where he would later use his position to groom and then sexually abuse [redacted]. MCSD's motion for summary judgement should be denied.

A. There is a Genuine Issue of Material Fact Concerning Whether MCSD Breached the Standard of Care When it Agreed to Conceal Ewinger's Conduct and Failed to Report Ewinger's Conduct as Required by Iowa Law.

Iowa generally recognizes the framework set forth in the Restatement (Third) of Torts: Liability for Physical Harm. *See Thompson v. Kaczinksi*, 774 N.W.2d 829 (Iowa 2009) (adopting Restatement (Third) of Torts: Liab. For Physical Harm § 7). Section 3 of the Restatement (Third) states "[a] person acts negligently if the person does not exercise reasonable care under all the circumstances." Restatement (Third) of Forts: Liab. For Phys. & Emot. Harm § 3 (2010); *see Hoyt v. Gutterz Bowl & Lounge L.L.C.*, 829 N.W.2d 772, 777–78 (Iowa 2013) (recognizing section 3 of the Restatement (Third)). The comments to section 3 of the Restatement (Third) note that "reasonable care frequently involves a failure to take a reasonable precaution," explaining,

> for example, a driver can be negligent for failing to step on the brakes when the driver's car approaches other traffic on the road. Such a failure can be described as an omission, and it hence can be said that the omission is itself negligent. Alternatively and preferably, it can be stated that the driver is negligent for the dangerous action of driving the car without taking the precaution of braking appropriately. Likewise, a company that transmits electric power can be negligent for omitting to have the power lines adequately inspected, or for omitting to warn persons of unexpected dangers. Alternatively, it can be stated that the company is negligent for transmitting electricity without taking appropriate precautions. In

> either situation, the key point is that the defendant's conduct has created a risk of harm to others.

Id., cmt. *c*; *see also Hoyt*, 829 N.W.2d at 777–78 (stating "section 3's reasonable care analysis may be applied in determining whether a particular failure to act is unreasonable.").

Section 19 of the Restatement (Third) addresses the specific application of section 3 in cases where, like this case, the defendant's alleged negligence stems from permitting improper conduct of a third-party. *See Hoyt*, 829 N.W.2d at 778 (recognizing section 19 of the Restatement (Third). Section 19 states: "The conduct of a defendant can lack reasonable care insofar as it ***foreseeably*** combines with or ***permits the improper conduct of*** the plaintiff or ***a third party***." Restatement (Third) of Torts, § 19; *see also Hoyt*, 829 N.W.2d at 778. As the comments explain,

> For example, the defendant's conduct may make available to the third party the instrument eventually used by the third party in inflicting harm; or that conduct may bring the plaintiff to a location where the plaintiff is exposed to third-party misconduct; or that conduct may bring the third party to a location that enables the third party to inflict harm on the plaintiff; or the defendant's business operations may create a physical environment where instances of misconduct are likely to take place; or the defendant's conduct may inadvertently give the third party a motive to act improperly.

Hoyt, 829 N.W.2d at 778 (quoting Restatement (Third) § 19 cmt. *e*, at 218).

In this case, the record shows that MCSD's conduct foreseeably permitted the improper conduct of Ewigner and thus increased the possibility of harm that Ewinger would cause to schoolchildren who had the terrible fortune of being selected for his future classrooms.[3] After

[3] In addition, in view of the unique facts of this case, particularly MCSD's knowledge of the gravity of Ewinger's conduct directed at young boys, MCSD had a professional obligation to—*at a minimum*—notify future school employers Ewinger's inappropriate conduct during his employment at MCSD (even if the employer did not contact MCSD before hiring Ewinger). *See* Restatement (Third) §§ 7, 39; CA APP 76-77, Dr. Else Affidavit ¶23; CA APP 28, Morran Deposition at 34:4-8; CA APP 50, Jenness Deposition at 56:19-57:10; CA APP 59, Vannatta Deposition 23:13-20. Dr. Else explains:

MCSD learned of Ewinger's conduct, MCSD knew, or should have known, that the only safe classroom was a classroom without Kyle Ewinger. MCSD itself "told [Ewinger] to leave their school" because the MCSD officials had "concerns that were brought to their attention" and "didn't feel comfortable" having Ewinger as a teacher once these facts came to light.[4] Dr. David Else,[5] Plaintiffs' expert witness, explains, "no reasonable and responsible school officials would have considered hiring Ewinger knowing the allegations" of Ewinger's conduct at Mediapolis. (CA APP 75, Else Affidavit ¶ 19). But in its desperate attempt to rid itself of Ewinger, MCSD agreed to cover up Ewinger's conduct and entered into an agreement[6] that prevented MCSD officials from reporting Ewinger's resignation to the Board of Educational Examiners pursuant to

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> Superintendent Whipple and the Mediapolis Community School District had the responsibility to report Ewinger to the Board of Educational Examiners. Regardless of the findings from a BOEE investigation, Mediapolis had a professional obligation to notify other school districts inquiring about Ewinger of the allegations against him. In addition, the circumstances of this case demonstrate that Mediapolis also had a professional duty to affirmatively inform future school districts that hired Ewinger of the allegations (even if the school district had not specifically contacted Mediapolis before hiring Ewinger), particularly in view of Mediapolis' prior knowledge of the seriousness of Ewinger's actions and the danger Ewinger posed to young boys who were exposed to Ewinger through school activities. Mediapolis could have stopped injury to students outside their district by a known predator but they did not.

CA APP 76-77, Else Affidavit at ¶ 23.

[4] CA APP 18-20, Akron-Westfield Investigation Notes, at 11-13.

[5] Dr. Else has a Ph.D. in Educational Administration from Iowa State University, a Post Administration Grad from the University of Northern Iowa, and a MA in Education from the University of South Dakota. He is the former Director of the Institute for Educational Leadership, Iowa Superintendent's Finance and Leadership Consortium, Iowa Regional Education Applicant Placement Program, and National Center for Public and Private School Foundations. He was a school administrator for fifteen years and then facilitated more than 125 superintendent, AEA administrator and private school president searches for over 25 years. Based on Dr. Else's extensive training and experience, he fully understands the duties and responsibilities associated with recruitment, hiring and induction of educators and leaders. *See generally* CA APP 78-104, Else CV.

[6] *See generally* CA APP 68-71, Settlement Agreement Between MCSD and Ewinger, dated November 30, 2004.

Iowa Code section 272.15,[7] prevented MCSD school officials from notifying and/or warning prospective employers of Ewinger's inappropriate behavior as a teacher, and affirmatively required MCSD to prepare a neutral letter of recommendation.[8] MCSD's conduct all but guaranteed that Ewinger would be permitted back in the classroom in another school.[9]

Further, aside from MCSD's conduct that created a risk to C.A. under sections 3, 7, and 19 of the Restatement (Third), MCSD had a duty to report the circumstances of Ewinger's resignation under Iowa law and failed to do so. *See Winger v. CM Holdings, L.L.C.*, 881 N.W.2d 433, 448 (Iowa 2016) ("[I]f a statute or regulation ... provides a rule of conduct specifically designed for the safety and protection of a certain class of persons, and a person within that class receives injuries as a proximate result of a violation of the statute or regulation, the injuries "would be actionable, as . . . negligence per se."). Iowa Code section 272.15 is Iowa's "pass the trash" law and its purpose is to protect Iowa's schoolchildren by stopping the cycle of abuse, dismissal or resignation, rehire, and abuse again (known as "pass the trash") that observers say occurs all too

[7] As discussed more fully below, MCSD had a legal obligation to report Ewinger's resignation to the Iowa Board of Educational Examiners pursuant to Iowa Code section 272.15. MCSD, however, agreed that it would not report Ewinger to the IBEE in exchange for Ewinger's resignation. MCSD thus engaged in affirmative conduct which it did negligently, thereby taking its conduct out of the public-duty doctrine framework altogether.

[8] CA APP 68-71, Settlement Agreement Between MCSD and Ewinger; CA APP 15, 11-30-04 Ltr from Whipple to Claeys ("This is to confirm that as Superintendent that I have agreed on behalf of the District and the Administration that we will not file a claim with the Board of Educational Examiners concerning Mr. Ewinger.").

[9] *See* CA APP 76, Affidavit of Dr. David Else, at ¶ 22 ("Having hired numerous teachers and principals as an elementary school principal and superintendent of schools and assisting boards of education in hiring superintendents, ***I believe this letter written by Superintendent Whipple for Ewinger actually draws hiring officials to Ewinger with key words and phrases as noted above.*** In addition, regardless whether any other school district actually received the letter, the clear intent of Mediapolis was to withhold the true nature of the allegations from future employers, which was a breach of the standard of care." (emphasis added)).

often when school districts learn of alleged sexual misconduct by teachers.[10] Section 272.15 achieves this purpose by requiring school districts to report adverse employment action, including resignations, prompted by allegations of misconduct. This disclosure requirement is for the benefit of a specific, identifiable group, namely, Iowa's schoolchildren who are exposed to danger of teachers whose misconduct resulted in adverse employment action; that is, students are exposed to the "trash" that was "passed" by school administrators. Thus, the public-duty doctrine does not apply.[11] *See Summy v. City of Des Moines*, 881 N.W.2d 333, (Iowa 2006) (public duty doctrine did not apply to invitees of golf course); *Wilson v. Nepstad*, 282 N.W.2d 664, 672 (Iowa 1979) (public duty doctrine inapplicable where ordinance protected identifiable group).[12]

Additionally, a special relationship existed between MCSD and [redacted] In *Raas v. State*, 729 N.W.2d 444, 450 (Iowa 2007), the Iowa Supreme Court applied the public-duty doctrine in the third-party tort context and held a special relationship exists when a third-party attacks a

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[10] *See* Erin B. Logan, National Public Radio, *Without Warning System, Schools Often 'Pass the Trash'—And Expose Kids to Danger* (April 6, 2018). Federal law echoes the protections found within section 272.15, stating:

> A State, State educational agency, or local educational agency in the case of a local educational agency that receives Federal funds under this chapter shall have laws, regulations, or policies that prohibit any individual who is a school employee, contractor, or agent, or any State educational agency or local educational agency, from assisting a school employee, contractor, or agent in obtaining a new job, apart from the routine transmission of administrative and personnel files, if the individual or agency knows, or has probable cause to believe, that such school employee, contractor, or agent engaged in sexual misconduct regarding a minor or student in violation of the law.

20 U.S.C. §7926.

[11] Plaintiffs join the arguments made by Sibley-Ocheyedan Community School District's Reply to Resistances to Motion for Leave to File Cross-Petition, filed October 12, 2018, in which Sibley-Ocheyedan addresses the liability arising from violation of Iowa Code section 272.15.

[12] A student who attends school and is exposed to a teacher with known pedophilic behavior is analogous to the plaintiff in *Summy v. City of Des Moines*, 881 N.W.2d 333, (Iowa 2006) who was an invitee on a golf course, and not analogous to a member of the general public as in *Kolbe v. State*, 625 N.W.2d 721 (Iowa 2001).

reasonably foreseeable victim of the third-party's dangerous tendencies. *Raas*, 729 N.W.2d at 450 ("Under the *Leonard* line of cases, the State's duty to protect victims from injury inflicted by escaped patients or prisoners extends only to those persons who are reasonably foreseeable victims."). In this case, MCSD knew that Ewinger used his position of authority as a teacher to hump a student, suck on a student's toes, have students sit on his lap, have students stay overnight with him, get into the private areas of his students, and target at-risk boys who were the sons of busy, single moms. Like Ewinger's victims at MCSD, [redacted]. was an elementary school boy, a student of Ewinger, and an at-risk youth with a busy mom. [redacted] fell squarely within the class of reasonably foreseeable victims of Ewinger's dangerous proclivities.

In any event, the public duty doctrine does not shield MCSD from liability at least because this case is one in which the defendant engaged in affirmative conduct it performed negligently when it agreed to conceal Ewinger's conduct and not report Ewinger's conduct to the IBEE as required under law. Because this is not merely a case where the defendant failed to act, the public duty doctrine is inapplicable. *See Johnson v. Humboldt Cnty.*, 913 N.W.2d 256, 266-67 (Iowa 2018) ("Cities, counties, and the state have to balance numerous competing public priorities, all of which may be important to the general health, safety, and welfare. This does not mean the same no-duty rule would protect that entity when it affirmatively acts and does so negligently. *Cf. Skiff v. State*, 479 N.Y.S.2d 946, 951 (1984) (finding the state could be liable when a vehicle left a state road and traveled along a drainage ditch into an earthen deadwall where the ditch was 'created by the State' and 'constituted a trap or snare'"). Thus, regardless whether Iowa Cod section 272.15 would ordinarily fall within the public-duty doctrine (it does not), MCSD's negligent affirmative conduct takes this case outside the public duty doctrine inapplicable as a matter of law.

Turning to the merits, MCSD breached its duty to report the circumstances of Ewinger's resignation under section 272.15. The statute provides:

> The board of directors of a school district or area education agency, the superintendent of a school district or the chief administrator of an area education agency, and the authorities in charge of a nonpublic school ***shall report to the board*** the nonrenewal or termination, for reasons of alleged or actual misconduct, of a person's contract executed under sections 279.12, 279.13, 279.15 through 279.21, 279.23, and 279.24, ***and the resignation of a person who holds a license, certificate, or authorization issued by the board as a result of or following an incident or allegation of misconduct*** that, if proven, would constitute a violation of the rules adopted by the board to implement section 272.2, subsection 14, paragraph "b", subparagraph (1), when the board or reporting official has a good faith belief that the incident occurred or the allegation is true. Information reported to the board in accordance with this section is privileged and confidential, and except as provided in section 272.13, is not subject to discovery, subpoena, or other means of legal compulsion for its release to a person other than the respondent and the board and its employees and agents involved in licensee discipline, and is not admissible in evidence in a judicial or administrative proceeding other than the proceeding involving licensee discipline. The board shall review the information reported to determine whether a complaint should be initiated. In making that determination, the board shall consider the factors enumerated in section 272.2, subsection 14, paragraph "a". For purposes of this section, unless the context otherwise requires, "misconduct" means an action disqualifying an applicant for a license or causing the license of a person to be revoked or suspended in accordance with the rules adopted by the board to implement section 272.2, subsection 14, paragraph "b", subparagraph (1).

(Emphasis added); CA APP 75, Else Affidavit at ¶ 17-18 ("Superintendent Whipple and the Mediapolis Community School District Board of Education had a legal duty under Iowa Code 272.15(2) to report disciplinary action taken against Kyle Ewinger."). Based upon the foregoing, because numerous actions by Ewinger, but specifically the act of "humping" a child, were the basis of MCSD's decision to force Ewinger's resignation, MCSD was required to report this information to the Iowa Board of Educational Examiners. *See* Iowa Code § 272.15 (Iowa 2003). Yet, MCSD did not report the information to the Iowa Board of Educational Examiners and violated Iowa Code § 272.15 (Iowa 2003). MCSD's failure to report created a substantial risk of harm to Ewinger's future students who were exposed by allowing Ewinger to maintain his license and

allowing prospective employers who contacted the Iowa Board of Educational Examiners to not be informed of Ewinger's prior actions.

B. There is a Genuine Issue of Material Fact on Concerning Whether MCSD's Breach of the Standard of Care Caused Damages.

MCSD asserts that Plaintiff is unable to provide any evidence that MCSD's actions (or inactions) caused harm to Plaintiff. This is simply not the case. Iowa recognizes the "but for" test of causation. But-for causation, also referred to as cause-in-fact and factual cause, requires only that the plaintiff establish that, "but-for the defendant's conduct, that harm would not have occurred." *Berte v. Bode*, 692 N.W.2d 368, 372 (Iowa 2005). The record establishes a genuine issue of material fact regarding causation in this case because reasonable minds could conclude that, had MCSD not agreed to prevent its school officials from disclosing Ewinger's pedophilic conduct from other employers and the IBEE and prepare a neutral letter of recommendation, Ewinger ultimately would not have been employed as a teacher at SOCSD, or anywhere else, and would therefore not have been to use position as a teacher to groom and sexually assault [redacted].

First, the current record shows that Ewinger would not have been employed by other school districts, including SOCSD, had MCSD not breached the standard of care. Dr. Else explains that no reasonable and responsible school official from AWCSD, SCCSD, or SOCSD would have considered hiring Ewinger had MCSD not prevented its school officials from notifying future employers and the IBEE about Ewinger's conduct. (Else Affidavit ¶ 19). Dr. Else observes that

> Mediapolis's conduct resulted in Ewinger causing injury to Mediapolis District children and at least three other young boys in three separate school districts, including [redacted] Superintendent Whipple and the Mediapolis Community School District could have stopped any further devastating damage to children. They had a duty to protect, failed to exercise the appropriate standard of care and allowed a pedophile access to young boys, including [redacted], through the state's school systems. Had it not been for their negligence, further injury to children, including [redacted], at the hands of Kyle Ewinger would not have occurred in schools.

(CA APP74-75, Else Affidavit ¶ 15). These observations are supported by evidence in the record that, absent MCSD's conduct of concealment, Ewinger's last day as a teacher would have been the day MCSD learned that Ewinger reportedly humped a student during an overnight stay. As SCCSD's Director of Human Resources testified:

> Q. And once passed on to your offices, is there a public agency in Iowa where you report misconduct with minors?
>
> A. Yes, the Board of Educational Examiners.
>
> Q. And if that information is passed on to BOEE, is that your understanding that that teacher is probably out of public education?
>
> A. Yes.
>
> Q. And if that teacher is out of public education in this case, first if it had been done at Mediapolis, he wouldn't have gotten to Akron; is that correct?
>
> A. Correct. You would file a Complaint with the Board of Educational Examiners . . . and they investigate.
>
> Q. And if had been passed on by Akron, he wouldn't have gotten to Sioux City?
>
> A. Correct?
>
> Q. And if had been passed on by Sioux City, he wouldn't have gotten to Sibley.
>
> A. Correct.[13]

In other words, had MCSD not prevented its officials from reporting Ewinger's conduct to the IBEE and other employers, Ewinger would not have been employed by Akron-Westfield, he would

[13] CA APP 60, Deposition of Rita Vannatta, at 27:7-25. Moreover, Akron-Westfield was recently added as a defendant in this case and, therefore, no school officials have been deposed as of the date of this filing. Plaintiffs expect to depose Akron-Westfield officials with knowledge of any communications with MCSD. The record establishes that it is customary for schools to contact the previous full-time school employer when reviewing applications for open teaching positions. (CA APP 33, Deposition of Jerry Robbins, 30:2-5); CA APP 25, Deposition of Morran, 25:2-4). In any event, the current record creates a genuine issue of material fact on causation for the reasons discussed above.

not have been employed by SCCSD, and he would not have been employed by SOCSD where he was able to groom and sexually assault [redacted].[14] For this reason alone, MCSD's motion for summary judgment must be denied.[15]

Second, Mr. Morran specifically testified that when hiring Ewinger at SOCSD, he contacted the Iowa Board of Educational Examiners. (CA APP-028). When he contacted the Iowa

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[14] *See* CA APP 24, Morran Deposition at 19:11-18 ("Q. When you are hiring somebody, you expect prior school districts to inform you or your committee about any prior allegations of inappropriate conduct. A. Yeah. When you do a reference check, that's when you usually—during that stage, yes. And you would expect honesty from all people that you check with references."); CA APP 50, Jenness Deposition at 58:24-59:25 ("Q If that allegation was out there during Mr. Ewinger's employment, was that something that you wanted to know? A Previously before we hired? Q Yes. A Absolutely. Q Why? A Because it's obviously an immoral act with a student that we wouldn't want to take anybody -- put our kids in that position."); CA APP 59, Vannatta Deposition at 23:16-20 (Q. Had the Sioux City Community School District been aware of the allegations that had been made at the Mediapolis School District, would it have hired Kyle Ewinger to begin with if it were aware of it? A. The district would not. Q. It goes without saying then, and I assume you would agree with me, that likewise had it been aware of what had occurred at Mediapolis after it hired Mr. Ewinger, but it came to knowledge after the hiring of him, would it recommend Mr. Ewinger for future employment working with other children at a future school district? A. We would not if we were aware of those allegations.").

[15] It should also be noted that the unique circumstances of this case required MCSD to notify future employers of Ewinger's conduct, even if they had not contacted MCSD prior to hiring Ewinger. As Dr. Else explains:

> Regardless of the findings from a BOEE investigation, Mediapolis had a professional obligation to notify other school districts inquiring about Ewinger of the allegations against him. In addition, the circumstances of this case demonstrate that Mediapolis also had a professional duty to affirmatively inform future school districts that hired Ewinger of the allegations (***even if the school district had not specifically contacted Mediapolis before hiring Ewinger***), particularly in view of Mediapolis' prior knowledge of the seriousness of Ewinger's actions and the danger Ewinger posed to young boys who were exposed to Ewinger through school activities. Mediapolis could have stopped injury to students outside their district by a known predator but they did not.

CA APP 76-77, Else Affidavit at ¶ 23; *see* CA APP 50, Jenness Deposition at 58:24-59:25 (stating he would have expected MCSD to contact him about Ewinger's conduct even after SOCSD hired him).

Board of Educational Examiners, he inquired as to whether anything was pending against Ewinger and whether there had been any prior actions taken against Ewinger. (CA APP-028). Yet, when Mr. Morran called the Iowa Board of Educational Examiners he received notice that Ewinger's license was active and that he had no disciplinary history. (CA APP-028-029). Based upon that report from the Iowa Board of Educational Examiners—which was completely clean because of MCSD's violations of § 272.15 (Iowa 2003)—Mr. Moran ultimately made the recommendation that Ewinger be hired. However, Mr. Morran expressly stated that had he had the information that MCSD possessed and ultimately concealed, he would have never made the recommendation that Ewinger be hired. (CA APP-028). Viewing these undisputed facts in the light most favorable to Plaintiff, this Court must deny MCSD's motion for summary judgment.

Third, Dr. Else explains that the neutral letter of recommendation would have *drawn hiring officials to Ewinger* making it *more likely* that Ewinger would be hired as a teacher in another school district. Dr. Else explains:

> 21. Superintendent Whipple and the Mediapolis Community School District Board of Education failed to protect and created harmful learning conditions in other districts by writing what was actually a fairly positive reference letter for Ewinger. Whipple states in the letter, that Ewinger "…gained experience in team teaching…", worked in a "… collaborative classroom…", and was a member "…of our building level goal team…focused on improving achievement in the area of math for the last three years generating strategies."
>
> 22. Having hired numerous teachers and principals as an elementary school principal and superintendent of schools and assisting boards of education in hiring superintendents, I believe this letter written by Superintendent Whipple for Ewinger actually draws hiring officials to Ewinger with key words and phrases as noted above. In addition, regardless whether any other school district actually received the letter, the clear intent of Mediapolis was to withhold the true nature of the allegations from future employers, which was a breach of the standard of care.

(CA APP 76, Affidavit of Dr. Else at ¶¶ 21-22).

Fourth, after rumors circulated in Akron-Westfield about Ewinger, AWCSD officials contacted MCSD to investigate Ewinger's conduct at MCSD. AWCSD interviewed MCSD

Superintendent Fred Whipple, Elementary Principal Tanya Langholdt, and Athletic Director Lyle McConnell. These MCSD officials provided AWCSD information concerning some of Ewinger's conduct at MCSD[16] but omitted the conduct that prompted MCSD to force Ewinger's resignation and enter into the agreement, namely, that Ewinger reportedly humped a student while Ewinger laid with the student in a sleeping bag overnight.[17] A reasonable fact-finder could conclude that, had MCSD not agreed to conceal this information in its agreement, MCSD officials would have disclosed the humping incident to AWCSD during its inquiry into Ewinger. In fact, Langholdt candidly stated that "she was limited in what she could say because of an agreement that was worked out when KE was told to leave their school."[18] Had MCSD disclosed the humping incident, it cannot reasonably be disputed that the fact-finder could conclude that AWCSD would have ended its contact with Ewinger—just like MCSD did—and/or, *at a minimum*, disclosed the humping incident to SOCSD when SOCSD called AWCSD's during its reference check when evaluating Ewinger's application.[19] Had AWCSD disclosed the information, there is little doubt that SOCSD would not have hired Ewinger or, at a minimum, implemented safeguards to ensure the safety of children like [redacted]

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[16] Even this watered-down version of Ewinger's prior conduct was credible and serious enough to prompt AWCSD officials to implement additional strict rules to oversee of Ewinger, including that Ewinger could not email or call students for any non-school related purpose, Ewinger could not photograph students, Ewinger could not invite students to stay overnight or take students on non-school related trips, and Ewinger could not invite students into their homes unless accompanied by their parents.

[17] *See generally* CA APP 18-20, Akron-Westfield Investigation Notes.

[18] *Id.*

[19] *See* CA APP 26-28, Morran Deposition 27:14-19, 33:21-34:8, 36:20-37:5 (stating that he spoke with officials from Akron and would have "absolutely" expected them to disclose Ewinger's alleged conduct at MCSD, including reports of humping children, and, had he known of the reports, he would not have hired Ewinger).

Based on the above, there exists a genuine issue of material fact on Plaintiffs claims against MCSD. In exchange for Ewinger's irrevocable resignation and ineligibly for future employment with MCSD, MCSD agreed not to disclose Ewinger's conduct to future employers and the Iowa Board of Educational Examiners and to prepare a neutral letter of recommendation that drew future employers to hire Ewinger. A reasonable fact finder could conclude that, but for this agreement and MCSD's violation of Iowa Code section 272.15, MCSD officials would have disclosed Ewinger's pedophilic conduct, including reports that Ewinger humped a student during an overnight, to future employers and the IBEE and, in doing so, Ewinger would not have ultimately been hired at SOCSD where ultimately groomed and sexually assault [redacted].

CONCLUSION

In viewing the facts in the light most favorable to the Plaintiff, along with all reasonable inferences, this Court should deny SCCSD's and MCSD's motions for summary judgment in their entirety.

WHEREFORE, the Plaintiffs respectfully request this Court deny Sioux City Community School District's and Mediapolis Community School District's Motions for Summary Judgment.[20]

Respectfully Submitted,

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[20] Mediapolis Community School District has also filed a Motion to Dismiss challenging Plaintiff's claims under section 272.15. Plaintiff respectfully requests the Court deny MCSD's Motion to Dismiss for the reasons stated above.

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CERTIFICATE OF SERVICE

The undersigned certifies that the foregoing instrument was served upon all parties to the above cause and to each of the attorneys of record herein at their respective addresses disclosed on the pleadings on October 19, 2018.

By: □U.S. Mail □ FAX
□ Hand Delivered □ Overnight Courier
□ Certified Mail X Other: EDMS

Signature /s/ *Scott M. Wadding*

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